

(2015) 11 GUJ CK 0028
In the Gujarat High Court
Case No : Criminal Appeal No. 834 of 1999

State of Gujarat	Vs	APPELLANT
Kinit Jayanatilal Amin and Others		RESPONDENT

Date of Decision : 03-11-2015

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Customs Act, 1962 — Section 107, 108
Evidence Act, 1872 — Section 106, 24, 25, 26, 27
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 2(xv), 22, 25, 29
Prevention of Terrorism Act, 2002 — Section 32
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 15

Citation : (2016) 1 CCR 454

Hon'ble Judges : Rajesh H. Shukla, J.

Bench : Single Bench

Advocate : H.L. Jani, APP, for the Appellant

Final Decision : Partly Allowed

Judgement

Rajesh H. Shukla, J.—The present Appeal is directed against the judgment and order delivered in NDPS Case No. 9/1998 by the Additional Sessions Judge, Vadodara dated 28.06.1999 recording acquittal and giving benefit of doubt to the respondents-accused.

2. The facts of the case briefly summarized are as follows:

"2.1 On the basis of the specific information received by the NCB Officers at Ahmedabad from the Bombay Office, the premises known as 11-B, Lotus Kot, East Wing, Hari Shakti Colony, Race Course, Vadodara was raided on 23.12.1997 and when they broken open the premises and during the search, 17.75 gram opium was seized. Further methaqualone powder was also seized along with the currency notes of American dollar, which was seized by making panchnama as stated in detail. The methaqualone powder along with machine, panch die and

tableting machine and other materials like knife, gupti, some incriminating documents were recovered, for which, panchnama has been made. It is the case of the prosecution that the respondent No. 1-accused, Kinit Amin has been involved in making tablets of mantrax in factory near Mehsana. It is also revealed that he is also involved in such offences, for which, Narcotic Cell Mumbai has also registered case No. 72/1994 and as referred therein, 5 tons of mantrax and 2.50 Kg. of methaqualone powder was recovered from the factory premises at Kadi and was sent to Arthor Road Jail, Bombay and, thereafter, at Nasik and when he came in contact with other accused, Rajendra, he had also escaped from the judicial custody/jail. It is also revealed that thereafter, the respondent No. 1-accused came to Gujarat at Vadodara and with the support of other co-accused, got premises and they had assisted in harboring the identity of the respondent No. 1-accused. The respondent No. 3, who is Managing Director of Kanaiya Food India Ltd., gave the respondent No. 1 a job as he was his nephew as Aditya Patel in his company and also premises and thus committed offence as alleged in abetting or assisting the respondent No. 1, who had escaped from the jail.

2.2 However, the respondent No. 1, who had escaped from the jail and was hiding, also indulged into other activities of procuring the material and making mantrax tablets, which has been recovered during the raid as stated above culminating into offence as stated hereinabove for the offence under the NDPS Act, for which, statements of the accused have also been recorded under Section 67 of the NDPS Act.

2.3 Therefore on the basis thereof, the aforesaid case was registered by NCB, which has been registered as Special Case No. 9/1998 before the Sessions Court, Vadodara.

2.4 Thereafter, the Sessions Judge proceeded with the trial and on the basis of appreciation of material and evidence as referred to in the judgment, recorded acquittal of the respondents-accused on the ground inter alia non-compliance with the mandatory provisions of the NDPS Act and/or lapse on the part of the investigation including the removal of the muddamal."

3. It is this judgment and order which has been assailed by the State in the present appeal inter alia that the Court below has failed to appreciate the material and evidence on record inasmuch as it has failed to consider the evidence with regard to the raid and the recovery and seizure of incriminating material including methaqualone powder with tableting machine and also corroborating evidence in the form of statements recorded and also failed to consider the documentary evidence. It is also stated that the Court below has committed an error while appreciating the evidence that the mandatory provisions as required under the law have not been complied with and the procedure has not been complied with.

4. Learned APP Shri Jani referred to the statements of A3 recorded under Section

67 of the NDPS Act at Exh. 110 dated 30.12.1997, Exh. 111 dated 01.01.1998, Exh. 115 dated 22.05.1998, Exh. 116 dated 26.03.1998, Exh. 113 dated 20.03.1999 and Exh. 114 dated 26.03.1999. It was submitted that the statement was recorded earlier and it was made only to mislead as stated in the disclosure.

5. Similarly, learned APP Shri Jani referred to other statements of A4 recorded under Section 67 of the NDPS Act at Exh. 119 dated 26.03.1999. He also referred to the statements of the accused persons under Section 313 of the Code of Criminal Procedure, 1973 and submitted that in those statements, nothing has been specifically stated. Learned APP Shri Jani submitted that the statement recorded under Section 67 of the NDPS Act is admissible in evidence. In support of this submission, he referred to and relied upon the judgment of the Hon'ble Apex Court in case of Raj Kumar Karwal Vs. Union of India and others, and in case of Ram Singh Vs. Central Bureau of Narcotics, and emphasized the observations made in Head Note - A & B. He also referred to these judgment for the purpose of statements under Section 313 of the Code of Criminal Procedure, 1973 and submitted that though the contentions are raised, no complaint has been made even at the time of statements under Section 313 of the Code of Criminal Procedure, 1973 nor any individual complaint has been made that the statements under Section 67 of the NDPS Act have been recorded by undue pressure, coercion, threat etc. Again he referred to the judgment of the Hon'ble Apex Court in case Kanhaiyalal Vs. Union of India (UOI), . Learned APP Shri Jani submitted that the officer is not the Police Officer and, therefore, the statement recorded prior to the arrest would be admissible as extra judicial confession.

6. Learned APP Shri Jani submitted that from the material and evidence on record, it is established that the conscious possession with the respondent No. 1 is clearly established inasmuch as methaqualone powder and other material including tablet machine etc. have been recovered and seized from the premises occupied by the respondent No. 1. Therefore if the contraband article is recovered from the premises, which is in possession of the accused, it would be the possession of the accused. Learned APP Shri Jani submitted that the substantial compliance is sufficient and the findings and the observation made by the Court below referring to Sections 42 and 57 of the NDPS Act are misconceived. Learned APP Shri Jani referred to and relied upon the judgment of the Hon'ble Apex Court in case of Bahadur Singh Vs. State of Haryana, and emphasized Head Note - A and submitted that substantial compliance is sufficient for the purpose of Section 57 of the Act. He again emphasized that "conscious possession would be established if the contraband article is recovered or seized from the premises in the possession of the accused". He submitted that if it is evident from the statement of other accused recorded under Section 67 of the Act and also statement of the respondent No. 1-accused that he was occupying the aforesaid premises at Vadodara, which was arranged by the respondent No. 2 for him then, it is not in dispute that the premises in question was taken on rent for the respondent No. 1-accused and he was in occupation and possession of the said premises at the time of raid which led to recovery of

contraband articles as stated above. Learned APP therefore submitted that once the conscious possession without any permission or authority is established, the provisions of NDPS Act would get attracted regarding the conscious possession in violation of the provisions of law. Learned APP submitted that there is no explanation on this aspect though attempt has been made to dispute about the mandatory provision of Sections 42 and 57 etc. of the NDPS Act. He submitted that the aspect of recovery of the contraband article from the premises in occupation and possession of the respondent No. 1 is not explained even in the statement under Section 313 of the Code of Criminal Procedure, 1973. Therefore learned APP Shri Jani submitted that inspite of sufficient opportunity, if the conscious possession is not explained, the charges are proved. It was further submitted that the burden would shift on the accused to explain such position once the conscious possession is established which is said to have been recovered from the premises in possession of the accused No. 1. Learned APP Shri Jani submitted that the reliance placed on the provision of Section 43 of the NDPS Act is misconceived as it has reference to the search of a person and not with regard to the premises. He therefore submitted that the Court below has committed an error in proceeding on such assumption though it is specifically applied to search of a person and the recovery from the person. Learned APP Shri Jani referred to and relied upon the judgment of the High Court of Gujarat in case of Omkarnath Kak @ Panditji v. State of Gujarat, reported in 2012 GLHEL - HC 229550.

7. Learned APP Shri Jani also referred to the testimony of the witnesses including PW-1, Exh. 71, PW-2, Exh. 81 and submitted that as stated by this witnesses, information received was reduced to writing, which is at Exh. 82. He also referred to the testimony of PW-3, Raiding Officer at Exh. 88 and submitted that the panchnama for the seizure of the muddamal are also proved which is at Exhs. 72, 73 and 74. He also referred to the testimony of other witnesses including the testimony of PW-7, Intelligence Officer of NCB at Exh. 107. He submitted that the issue would be whether the statement under Section 67 of the Act could be said to be a confessional statement and admissible in evidence. Learned APP Shri Jani submitted that the statements which have been recorded prior to the arrest would also be admissible in evidence. For that, he referred to Section 67 of the NDPS Act. He submitted that as it is clearly stated that it was explained to the persons that it could be used against him and after sufficient undertaking, if it was stated, now they cannot be permitted to be backed out or retracted on the ground that it was under pressure or coercion without any complaint made earlier or having stated so in the statement under Section 313 of the Code of Criminal Procedure, 1973. He also submitted that such statements are admissible and apart from the statement, recovery of the contrabands article from the premises in conscious possession of the accused No. 1 is not disputed and, therefore, the findings recorded by the Court below are erroneous.

8. The respondent No. 1-accused viz., Shri Kinit Jayantilal Amin, who appears as party-in-person, referred to the papers and tried to give background that in a

Bombay case, earlier he was arrested and, thereafter, he is said to have been absconding. He submitted that therefore the charges are with reference to the background and that he has been involved in making and selling mantrax tablets. He submitted that other accusation qua rest of the accused is harboring the other co-accused.

9. Shri Amin submitted that it is the duty of the prosecution to prove the case beyond reasonable doubt and it has to prove as to what was recovered or seized from the premises at Vadodara in occupation and possession of the accused. Shri Amin submitted that therefore it is necessary for the prosecution to establish that whatever was recovered and seized from the premises at Vadodara stated to be in possession of the accused No. 1, was the contraband article. He referred to the papers and submitted that some muddamal was sent to FSL, however referring to the papers at length, he tried to submit that initially it is stated that the muddamal referred to the FSL was for C.R. No. 1/1996. He emphasized that admittedly this case is C.R. No. 2/1997 and, therefore, muddamal has changed. For that, he referred to the complaint, Exh. 1 and also Exh. 84 to emphasise that the present case is concerned with C.R. No. 2/1997, whereas what has been referred to in FSL is muddamal of C.R. No. 1/1997. Therefore, it is totally a different material and, therefore, it could not be said to have been established that the accused was in conscious possession of the contraband articles.

10. Shri Amin also referred to the testimony of PW-2 and also referred to the documents including at Exh. 81 and also Exh. 107. He submitted that it has been confirmed by the Investigating Officer that he had verified all the papers when he took charge of the investigation, meaning thereby, he would have verified with regard to the muddamal and also muddamal which was forwarded to the FSL. Again he referred to Exh. 91, which is a forwarding letter sent to FSL and submitted that it refers to Crime No. AZU/NCB/01/1997, meaning thereby, it was of another case as the present case is Crime No. AZU/NCB/02/1997. He therefore submitted that no reliance could be placed on the FSL report which could be regarding another muddamal and not connected with the present case, which is registered as Crime No. AZU/NCB/02/1997. Shri Amin also referred to test report, Exh. 144 and also testimony of PW-3 at Exh. 88. He submitted that a close look at Exh. 144, it reveals that Clause-3 refers to 12.75 gms. opium, whereas reference is made to weight at 8.137 gms. Similarly, he referred to Exh. 97, report of FSL and Exh. 144, test report and submitted that there are six items and the report refers to only two items i.e. morphine and meconic acid. Again he tried to canvas his submission with reference to the discrepancy in total weight and quantity to support his submission that it was not the same muddamal, which was referred to FSL and, therefore, if the samples have been changed or tampered with, the conviction could not have been recorded and, therefore, acquittal which has been recorded, is just and proper. He also referred to Exh. 85, which is muddamal and Exh. 81 and again referred to the testimony of PW-3 at Exh. 88 to emphasis his submission that the muddamal was seized on 23.12.1997 and sent to FSL on 26.12.1997 and there is no clarity as to who was

in the possession during the intervening period. He tried to submit that a close look at the testimony of PW-3 at Exh. 88 further support his submission of the defence that there was another laboratory test, for which, some black substance was sent as stated by PW-3. He emphasized that he has admitted that no permission was obtained. He referred to the testimony of PW-3, Shri Raghuvanshi at Exh. 107 and submitted that he has stated that he had sent it to the FSL.

11. Shri Amin therefore submitted that Exh. 85 cannot be relied upon in view of the fact that entry was made in 1998 and after it was received from Bombay, sent to FSL. Again he tried to see that it has not been properly sealed. Shri Amin referred to and relied upon the judgment of the Hon'ble Apex Court in case of Thana Singh v. Central Bureau of Narcotics, reported in , (2013) 2 SCC 603 with regard to two samples and emphasized the observations made in this judgment.

12. Shri Amin also submitted that there is noncompliance with the mandatory provisions of NDPS Act. For that purpose, he referred to Sections 47(2) and 42 of the Act. He submitted that Section 41(2) of the Act prescribes the procedure which is required to be followed and submitted that whether this procedure has been followed, is required to be examined in background of the testimony of PW-3, Tomar. She Amin submitted that fact that Shri Tomar has been authorized, has to be proved. Similarly, he referred to testimony of PW-2, Exh. 81. He emphasized that there is nothing to suggest that PW-2 has sent report to superior officer.

13. Similarly, Shri Amin referred to the testimony of PW-3 at Exh. 107. He submitted that Notification produced at page Nos. 267-268 are suggesting that the authorized officer of NCB could take action under Section 42(2) of the Act only and it refers to the fact that the officer so authorized, Shri Tomar was not authorized as there is nothing produced on record. Shri Amin, therefore, stated that there is noncompliance with the mandatory provisions. He referred to the testimony of Shri Oza, PW-7 and submitted that there is noncompliance of Sections 52 and 52C of the NDPS Act. He again emphasized that Section 57 provides that the report should be made to the higher or superior officer and PW-2 has stated that he has not made any such report.

14. Similarly he referred to Exh. 94 and Exh. 95, which are FSL report and test report along with Exh. 104. Shri Amin submitted that Chemical Examiner is not examined at all and still it has been exhibited. Further he submitted that the report does not state the specific procedure for the examination and, therefore, no reliance could be placed on such report. In support of his submission, he referred to and relied upon the judgment of this High Court in case of Mahmad Hanif Shaikh Ibrahim Vs. State of Gujarat, .

15. Shri Amin therefore submitted that there is absence of fair investigation and fair trial. He submitted that PW-3, Shri Raghuvanshi, who was part of the raiding party, was also an Investigating Officer and who has also filed the complaint. He

pointedly referred to the cross-examination. Similarly, he referred to the testimony of PW-1, Exh. 71 and PW-2, Exh. 81. He submitted that there was no need for Shri Oza, PW-7 to go as stated in para No. 6 of his testimony as they have selected or chosen witnesses and, therefore, the evidence is not reliable including the recovery and seizure of contraband articles.

16. Shri Amin referred to the provision of Section 67 of the NDPS Act and submitted that the statement under Section 67 of the Act are not confessional statements and there is no reliable independent evidence to corroborate that such statement is recorded under Section 67 of the Act. Again he emphasized that there is no evidence that it was recorded voluntarily without any pressure. Shri Amin submitted that no citizen can be held guilty on such uncorroborated confession, which is not recorded and it cannot be said to be confessional statement. He submitted that even if it is an extra-confessional statement, it is in the nature of weak evidence and that may not be termed as substantive evidence without any corroboration. He submitted that empowered officers under Section 53 of the Act are also Police officers and, therefore, the statement recorded would be heat by Section 25 of the Act as the statements before the Police. In support of his submission, he referred to and relied upon the judgment of the Hon''ble Apex Court in case of Noor Aga Vs. State of Punjab and Another, and emphasized the observations made therein. He further referred to another judgment of the Hon''ble Apex Court in Criminal Appeal No. 2118/2008 to support his submission with regard to Section 42 of the Act. He also referred to the provisions of Sections 42 and 57 of the Act and submitted that both are mandatory and both are not complied with.

17. Shri Amin finally submitted that the powers of appellate Court may also be considered. It was submitted that the appellate court may not disturb the findings of the acquittal easily or merely because there are two views. In support of this submission, he referred to and relied upon the judgment of the Hon''ble Apex Court in case of Muralidhar @ Gidda and Another Vs. State of Karnataka, . He submitted that as observed in para No. 12, the relevant aspects are required to be considered. Ghurey Lal Vs. State of U.P., . He therefore submitted that the judgment and order of the court below recording acquittal may not be disturbed and the present appeal may be dismissed.

18. Learned advocate, Shri A.K. Thakur for the respondent Nos. 2 to 4 submitted that he may supplement the submissions made by Shri Amin, party-in-person as the charges qua respondents-accused Nos. 2 to 4 are with regard to the harboring the accused No. 1. He referred to the charges. Learned advocate, Shri Thakur submitted that the charges are for harboring and admittedly one Shri Amin was the owner of the flat in premises. He referred to the testimony at Exh. 103. Similarly, he submitted that the information is said to have been received by PW-2, on the basis of which, search was carried out, however, search was carried on 23.12.1997 at Vadodara in the evening and the prosecution has not examined as to who has given information to PW-2. Further that message or

information has not been reduced to writing or reflected in any register and, therefore, such information is fabricated. He submitted that there is no evidence that A-1 was absconding. He referred to the testimony of witnesses and submitted that the original accused No. 2 has explained that he was not aware that the A-1, Shri Kinit Jayantilal Amin has escaped from the Bombay jail. He therefore submitted that there is no evidence with regard to the appointment or placement of the A1 as a Marketing Manager in the firm of the original accused No. 2 (kako). He therefore submitted that there is no evidence that he has given any support as there is no public notice also given. He submitted that there is no independent witness examined like who had broken open the lock, who were the persons residing in the flat and what articles have been seized. He pointedly referred to the observations made in para No. 44 and submitted that if view taken by the Court below is a possible view on the basis of the appreciation of material and evidence, same may not be disturbed.

19. In rejoinder, learned APP Shri Jani again referred to the statements recorded under Section 67 of the Act. He referred to Section 43 of the Act regarding search, seizure and arrest without warrant. It was submitted that the report has been made regarding the search and seizure, which is at Exh. 90. He submitted that Tomar was the officer of NCB and he referred to Exh. 83. He therefore submitted that Section 42 of the Act is complied with. Similarly for Section 50 of the Act, he submitted that it has application qua the search of a person and not the premises and, therefore, it would not be attracted. In support of his submission, he referred to and relied upon the judgments of the Hon''ble Apex Court in case of Madan Lal and Another Vs. State of Himachal Pradesh, , in case of Jarnail Singh Vs. State of Punjab, and in case of Beckodan Abdul Rahiman Vs. State of Kerala, and also submitted that when in the search, it is evident that the premises is in possession and contraband article is recovered, it would be a conscious possession, which is required to be explained. In support of this submissions, he referred to and relied upon the judgment of the Hon''ble Apex Court in case of Madan Lal (supra) and emphasized with regard to the burden of proof as observed in this judgment. He also referred to and relied upon the judgment of the Hon''ble Apex Court in case of Gurbax Singh Vs. State of Haryana, . Learned APP Shri Jani submitted that the conscious possession is established by way of testimony of PW-4, PW-5 and PW-6 and again he referred to and relied upon the judgment of the Hon''ble Apex Court in case of Kulwinder Singh and Others Vs. State of Punjab . He emphasized the word "possession" and referring to Head Note, he submitted that conscious possession is established. Similarly, he reiterated the submission with regard to the compliance with the mandatory provision stating that as provided, substantial compliance is sufficient for Section 57 of the Act. He submitted that the premises, which has been searched in possession of the accused at the relevant time, would imply that the contraband articles are recovered from the possession of the accused.

20. Learned APP Shri Jani again referred to Section 67 of the Act with regard to the statement and submitted that even if it may not be accepted as confessional

statement or extra judicial confession, it may have to be considered. He again referred to the judgment of the Hon"ble Apex Court in case of Raj Kumar Karwal Vs. Union of India and others, and in case of Ram Singh (supra) and emphasizing the observation in Head Note, he submitted that there is no explanation under Section 313 of the Code of Criminal Procedure, 1973 also and even at that stage, there is no grievance made with regard to the statement recorded under Section 67 of the Act and, thereafter at belated stage, merely by contending that it was obtained under pressure, may not be accepted. Learned APP Shri Jani also referred to the judgment of the Hon"ble Division Bench of this High Court in Criminal Appeal No. 1297/2008. He also referred to the judgment of this High Court in case of Amad Noormamad Bakali Vs. (The) State of Gujarat and Others, and also judgment of the Hon"ble Apex Court in case of State rep. by Inspector of Police, Vigilance and Anti-Corruption, Tiruchirapalli, Tamil Nadu Vs. V. Jayapaul, and submitted that the complainant can be an Investigating Officer in a given case. Learned APP Shri Jani submitted that when FSL report and test report were exhibited, no objection has been raised and once it has been exhibited, it could have been challenged. He submitted that admittedly it has also not been challenged and, therefore though the accused had the opportunity, he has not raised any such objection and, therefore, now it cannot be permitted to say that FSL report may be brushed aside. He also submitted that what were the test carried out has also not been disputed and, therefore, FSL report cannot be doubted. Learned APP Shri Jani submitted that though court may be slow in disturbing the findings of acquittal recorded by the Court below, there are no fetters on the powers of the appellate court. Learned APP Shri Jani submitted that in the interest of justice, if necessary, the appellate court can scrutinize and appreciate the evidence and if the Court below has committed an error either in interpreting or complying with the law like mandatory provisions of the Act then, such judgment may not be sustained. He therefore submitted that the present appeal may be allowed.

21. In view of these rival submissions as recorded hereinabove, and on appreciation of the material and evidence, it is required to be considered whether the present appeal deserves consideration.

22. It is well-settled that there are no fetters on the powers of the appellate court to scan and reappraise the evidence when the court below has misdirected while considering the statutory provisions and/or appreciating the material and evidence. A useful reference can be made to the judgment of the Hon"ble Apex Court reported in State of M.P. Vs. Madanlal , wherein the Hon"ble Apex Court has observed that the appellate court has a duty to make complete and comprehensive appreciation of all vital features of the case and scrutinizing the evidence brought on record with care and caution. In other words, the focus is on the underlying goal or purpose of justice which should not be compromised and has focused on the approach while considering such appeals. Therefore, the benefit of doubt or some discrepancy here or there cannot be a ground or an escape route from conviction.

23. In the present case, observations have been made with regard to non-compliance with the mandatory provisions like sec. 50 , 42 of the NDPS Act. Provisions of sec. 50 refer to the search of a person and the conditions which are required to be fulfilled. However, the contraband articles have been recovered not from the search of the person of an accused, but from the premises like the flat occupied by A-1 and therefore sec. 50 would not have any application. The Hon"ble Apex Court dealing with this aspect has made the observations in a judgment reported in Jarnail Singh Vs. State of Punjab, . In this judgment referring to the earlier judgment in the case of Megh Singh Vs. State of Punjab, , it has been quoted,

"A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to a search of a vehicle or a container or a bag, or premises."

(emphasis supplied)

The same view has also been considered in a judgment reported in State of Punjab and Others Vs. Manjit Singh and Others, .

24. One more aspect which is required to be considered is that sec. 50 refers to the conditions that an offer has to be made to such a person who is to be searched and that he could be searched in presence of a gazetted officer. In the facts of the case, Shri Tomar himself was a gazetted officer. Therefore, there was no question of non-compliance of any of such mandatory procedure or conditions. Similarly, sec. 42 refers to authorisation and the procedure to be followed for the purpose of search. It provides that the officer empowered in this behalf by general or special order of the Government, if he has a reason to believe from personal knowledge or information given by any person with regard to any contraband substance, that the offence has been committed or any such material is kept or concealed in any building, he may enter into search any such building. Officers like Shri Trivedi and Shri Oza who visited the premises were already gazetted officers and when the officer who conducted such search is a gazetted officer himself, the compliance with the provisions of sec. 42 is not necessary. A useful reference can be made to the judgment of the Hon"ble Apex Court reported in Union of India (UOI) Vs. Satrohan, .

25. Therefore, the emphasis is given on non-compliance with the mandatory provisions as well as while considering the aspect of conscious possession, the court below has misconceived the statutory provisions while appreciating the material and evidence.

26. While considering the aspect of conscious possession, as it transpires from the testimony of witnesses Shri Oza at exh.88 and Shri Trivedi, it is clearly stated that they had visited the building and after making inquiry had broken open the flat which was occupied by the accused. The panchnama at exh. 72 has been made. It refers to the recovery of contraband article which is one such substance of brown colour and another of white colour along with other material

instruments. This aspect has a relevance for the purpose of considering conscious possession of the respondent accused. When the contraband article is not recovered from the person of the accused, still, he could be said to be in conscious possession if the same has been recovered from the bag, premises etc. belonging to or occupied by him. The court below has failed to consider this aspect that the flat was occupied by A-1 which was arranged by A-2. Both the accused have not stated anything in their statement recorded under sec. 313 explaining on this aspect, whereas the material and evidence on record including the testimony of Shri Tomar, exh. 81, Shri Raghuvanshi, exh. 107 and Shri Oza, exh. 88 clearly states as to how they have received the information with regard to occupation of the flat by A-1 which in turn was arranged by A-2, and on the basis of the inquiry or verification made, they had confirmed and thereafter made a search of the premises. The same has also been corroborated in the form of testimony of PW-4, exh. 100 who was also staying in the same building and has stated that A-1 was staying in the same building. Further, Shri Sukhadia, PW-6 in his testimony at exh. 103, has stated that the premises in question was given by him to Shri Jayubhai Amin, A-2. He has also stated that he is managing and looking after the flat of one Harshaben and Jayantbhai who are at USA and therefore from 1997 he has given to Jayubhai Amin and identifies also. The court below has misdirected while considering the reasons on the aspect of conscious possession of such contraband articles and has gone on to discuss that there is no material with regard to possession of A-1.

27. The Hon''ble Apex Court in a judgment reported in Madan Lal and Another Vs. State of Himachal Pradesh, has discussed this aspect of conscious possession and has made the observation,

"The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others, to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes."

The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.....

The word "possession" means the legal right to possession (see Heath v. Drown [(1972) 2 All ER 561]. In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same (See Sullivan v. Earl of Caithness [(1976) 1 All ER 844])"

28. Further, discussing on this aspect of conscious possession, it has been made clear that it is not necessary that it should be possessed by a person at the relevant time himself but it has been also interpreted that if it is kept or stored at a place to his knowledge at a place or premise within his control, then, also it

would be said to be his conscious possession.

29. The Hon''ble Apex Court in a judgment in the case of Kulwinder Singh and Others Vs. State of Punjab , has again discussed on this aspect of possession and has observed and quoted from its earlier judgment in the case of Madanal and anr. (supra),

"From the aforesaid exposition of law it is quite vivid that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession."

30. Further it has also been observed that if the substance is not found in his physical control and is concealed in a property and moves out thereafter and still it could be said to be within his conscious possession. Further, referring to the earlier judgment in the case of Gunwantlal Vs. The State of Madhya Pradesh, , the Hon''ble Apex Court has observed,

"Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control."

31. Therefore, on the basis of material and evidence, as discussed hereinabove, once the conscious possession with regard to recovery of the contraband article i.e. brown colour and in white colour bags are recovered from the flat occupied and in possession of A-1, the burden would shift at least to give any explanation on this aspect. The statement under sec. 313 of CrPC recorded does not refer to this aspect. Therefore, once conscious possession is established that A-1 was in possession of the contraband articles and when there is no explanation coming forth, the acquittal of A-1 for the offence under sec. 18 regarding conscious possession cannot be sustained and is held to be erroneous.

32. Another facet of the argument with regard to appreciation of material and evidence and the conduct with the background of facts is required to be focused. As could be seen from the background of facts, A-1 is having the history of similar cases at Bombay. Further, as it transpires, he has absconded while he was in Arthur Road Jail and the charges qua rest of the accused are regarding harbouring and they are joined as co-accused. It is during the prosecution or pendency of the proceedings at Bombay High Court he had escaped from custody or jail culminating into the present case. During this time he had made arrangement for the contraband articles for the purpose of making mantrax tablets. Therefore, seizure of such articles which have been recovered from the premises at Baroda occupied by A-1 would require a closer scrutiny for the purpose of appreciation of further evidence in the form of statement recorded under sec. 67 of the Act.

33. The statements under sec. 67 of the NDPS Act which have been recorded would be admissible in evidence and therefore it would be relevant for the purpose of considering and appreciating the evidence. The court below has failed to note on this aspect. The statement under sec. 67 of the Act are admissible in evidence as observed in judicial pronouncements including the judgment of the Hon"ble Apex Court reported in Kanhaiyalal Vs. Union of India (UOI), . Discussions have been made referring to these aspects from para 35 to 38. It has been observed,

"A parallel may be drawn between the provisions of Section 67 of the NDPS Act and Sections 107 and 108 of the Customs Act and to a large extent Section 32 of the Prevention of Terrorism Act, 2002 and Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987..... As long as such statement was made by the accused at a time when he was not under arrest, the bar under Section 24 to 27 of the Evidence Act would not operate nor would be provisions of Article 20(3) of the Constitution be attracted. It is only after a person is placed in the position of an accused that the bar imposed under the aforesaid provision will come into play.

Of course, this Court has also held in Pon Adithan Vs. Deputy Director, Narcotics Control Bureau, Madras, that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20(3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.....

Considering the provisions of sec. 67 of the NDPS Act and the views expressed by this Court in Raj Kumar Karwal Vs. Union of India and others, with which we agree, that an officer vested with the powers of an officer in charge of a police station under sec. 54 of the above Act is not a "police officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the NDPS Act to be used as a confession against the person making it and excludes it from the operation of Section 24 to 27 of the Evidence Act."

34. In the same way, in a subsequent judgment reported in Tofan Singh Vs. State of Tamil Nadu, this aspect has been considered and the issue whether it can be treated as a confessional statement or not even if the officer is not treated as a police officer it has been referred to a larger Bench.

35. Therefore, again, it has two aspects,

"(i) even if the issue is referred to the larger Bench, as it stands today, the earlier judgment of the Hon"ble Apex Court will hold the field and it would apply.

(ii) even if it is accepted that the statement recorded under sec. 67 of the NDPS

Act is not a confessional statement and it may not be put on the pedestal of a confessional statement, still, it would be admissible in evidence as a disclosure statement by which revelation is made."

36. Therefore, such a statement which may be considered as a disclosure statement could be considered for the purpose of corroboration in light of sec. 6 , 7 and 8 of the Evidence Act. Section 8 of the Evidence Act refers to any fact is relevant fact which shows or constitutes a motive or preparation for any fact in issue or relevant fact. Section 6 refers to the facts which, though not in issue, are so connected with the fact in issue as to form part of the same transaction, are relevant.

37. In the facts of the case, the contraband articles are recovered from the conscious possession of A-1 which has been confirmed in the report by the FSL to be mantrax tablets or opium. Therefore, the conduct of A-1 is required to be considered as a relevant conduct or the fact that he was in jail in Bombay, escaped from Arther Road Jail, had a contact while in jail in Bombay with other inmates through whom he had designed for the offences alleged. There are also facts that while in jail he had met an inmate who was asked to join him and was sought to be involved for banking fraud.

38. Therefore, the statement under sec. 67 of the NDPS Act may be accepted in the form of a disclosure statement which may led to further establishment of the fact in issue in respect of the time and place of the offence. It could be a corroborative evidence for the purpose of establishment of the relevant fact in issue with reference to the conduct of the accused. Therefore, the facts which are within the knowledge of A-1 whether before or after the incident would be relevant which can be considered while appreciating the evidence including the statement under sec. 67 of the NDPS Act. Further, as per sec. 106 of the Evidence Act, the burden would be on A-1 of establishing the facts within his knowledge. Thus, the fact that the contraband articles are recovered from the flat in possession of A-1 is corroborated and established by the testimony of witnesses at PW-3, exh. 88, PW-4, exh. 100 and PW-6, exh. 103. Further, it corroborates the statement of A-2 as well as A-1 under sec. 67 to complete the chain for the offences alleged against A-1 regarding conscious possession as well as for making mandrax tablets for the purpose of selling it. Therefore, it would attract and establish the charges for the offence under sec. 18 of the NDPS Act.

39. Therefore, the submission made by the respondent A-1, Shri Kinit Jayanatilal Amin, that the statement has also been retracted and there cannot be any conviction recorded on the basis of such uncorroborated confession is misconceived. It cannot be said that there is no corroborative evidence. In fact, it could also be considered as an extra-judicial confession made by A-1 and therefore also the submission made by A-1 Shri Amin cannot be accepted. Further, the submission is made by Shri Amin that the empowered officer under sec. 53 of the NDPS Act is the police officer and therefore the statement recorded by the officers are having the status of police officers and therefore are

hit by sec. 25 of the Evidence Act. He has also referred to and relied upon the judgment reported in Noor Aga Vs. State of Punjab and Another, and has emphasised on this aspect. He has also referred to the judgment of the Division Bench of this High Court in Criminal Appeal No. 1210 of 2011 and allied matters.

40. Though the submissions have been made as stated above, it cannot be said that any statement would be hit by sec. 161 of the Code. In any view of the matter, even if it is not treated as a confessional statement, it can be said to be a disclosure statement. On the basis of such disclosure or revelation if it has led to incriminating document or material it would be a relevant fact and would be squarely covered by sec. 6 and 8 of the Evidence Act. If the fact in issue has a nexus with the conduct of the accused either before or after the incident and any statement or disclosure made before the officer like the statement under sec. 67 of NDPS Act establishes the facts which corroborate conscious possession of A-1 of contraband articles from the premises occupied by him, any such argument would not help the respondent, A-1. The conscious possession is established independent of any statement under sec. 67 and the conscious possession from the premises occupied by A-1 lead to establishment of the fact of conscious possession with the intention or knowledge for making mantrax tablets or marketing such contraband articles which can be viewed with support of statement under sec. 67 as a corroborative evidence.

41. One more aspect which has been emphasised is with regard to the so-called identity and the movement or position of the muddamal in question. Though party-in-person Shri Amin, A-1, has emphasised with reference to the fact that the present case is regarding Crime No. AZU/NCB/02/1997 it is not the case in which the accused is said to have been involved. He emphasised that what was seized was not sent to the FSL as there is a discrepancy and a different muddamal in respect of Case No. AZU/NCB/01/1997 has been sent to FSL. He referred to exhs. 91 and 92 in support of his submission. He also referred to exh. 144, the test report which also refers to the same Case No. However, a close look at the testimony of Mr. Devdat Oza, PW-3, exh. 88 is required to be made. Though the party-in-person Shri Amin has emphasised on this aspect referring to exhs. 92, 94 and 95, the letter of the Govt. of India, exh. 86, refers to the NDPS Case No. 2/97 which bears the seal of the Narcotics Control Bureau with the same officer and it tallies with the weight also. The report/test memo at exh. 94 confirms that it had reached in a sealed condition and it also confirms two aspects, (i) the test memo at exh. 94 refers to whitish brown powder, and (ii) the test memo at exh. 95 refers to black soft substance (Opium) and the report is,

"Sample is in the form of dark brown coloured thick sticky mass. It answers tests for the presence of Morphine, Codeine, Thebaine, Papavozine and Narcotine and Meconic acid.

Morphine strength could not be determined due to insufficient quantity of sample received.

Sealed remnant sample returned. The facsimile of the Dy. C.C. Seal used for sealing the remnant sample is given below."

42. Therefore, it confirms about the fact that the black soft substance is found to have presence of morphine, codeine, thebaine, papavozine and narcotine and meconic acid. Further, the morphine strength could not be determined due to insufficiency of quantity received as stated and therefore it has been returned. It is in this background another sample is sent which could be seen from exh. 97 and it confirms the testimony of witnesses, PW-3 and PW-4.

43. Exhibit 144 is again a report made by the Chemical Examiner and he has specifically stated in his own hand-writing,

"The sample is in the form of dark brown, thick sticky mass. It answers tests for the presence of morphine and meconic acid.

Morphine content on sample as such = 1.61% Hence it is opium falling under section 2(xv) of NDPS Act 1985.

Sealed remnant sample returned. Facsimile of the Dy. C.C. seal used for sealing the remnant sample is given below."

44. Further, the submission made by Shri Amin, A-1 with regard to the muddamal or the movement of muddamal it is not in dispute that the muddamal has been recovered and seal has been applied. Thereafter it is kept with NCB though PW-3 Shri Oza in his testimony at exh. 88 has stated that during the period 23.12.97 to 26.12.97 it was with him. However, that by itself would not make any difference as when it was sent to the FSL it has been with the same sealed condition found with the FSL for which receipts are also given. Similarly, some discrepancy in the testimony of the prosecution witnesses that he has not made any entry in a particular register which is clarified that they are not maintaining such register, and has also stated that it was handed over in a sealed condition which has reached the FSL for which receipt is also given by FSL as stated above. Therefore, merely because by inadvertence initially the case no. was stated as AZU/NCB/01/1997 instead of AZU/NCB/02/1997 would not make any change as the receipt and other material clearly refer to the same muddamal and by inadvertence at some place if it is typed as AZU/NCB/01/1997 would not be fatal to the prosecution case, which has not been appreciated by the court below. In fact, it would require a close scrutiny of the entire relevant evidence which would have revealed that it was like a mistake in mentioning the number though the muddamal remained the same which is evident from the material and evidence on record including the receipts and the report of the FSL.

45. The submission made by Shri Amin, party-in-person, that Shri Oza was the complainant and he was the I.O. and therefore the entire investigation is bad and the trial is vitiated is misconceived. A useful reference can be made to the judgment of the Hon'ble Apex Court in the case of State, represented by Inspector of Police, Vigilance & Anti-corruption, State rep. by Inspector of Police,

Vigilance and Anti-Corruption, Tiruchirapalli, Tamil Nadu Vs. V. Jayapaul, , wherein it has been observed that in a given case the complainant can be the I.O. and therefore such an argument would not be of any consequence.

46. The issue regarding harbouring A-1 by other co-accused is required to be considered. PW-6 has turned hostile and in examination-in-chief he has stated about the fact that the premises was given to Shri Jayubhai Amin, A-2, in the year 1997. Therefore, considering the statement of A-2, A-1 under sec. 67 of NDPS along with other evidence in the form of testimony of PW-6 as well as PW-7, Shri Raghuvanshi at exh. 107, at the most it would suggest that Shri Jayubhai Amin, A-2, had made the flat available to A-1 as he was his nephew. However, from the aforesaid testimony of witnesses and also the statement of Shri Jayubhai Amin, A-2 under sec. 67 of the NDPS Act, it cannot be said that he had the knowledge of the activity or intention. Therefore the allegations of harbouring which would attract the offence under sec. 29 or any other offence alleged qua Shri Jayubhai Amin, A-2, cannot be said to have been established. Similarly, from the material and evidence on record, no charges can be said to have been established for the involvement of Shri Jayubhai Amin, A-2, Shri Ashish Natubhai Amin @ Pintu, A-3 and Shri Bharatbhai Dhirajbhai Patel @ Ramesh, A-4. It is required to be mentioned that for the purpose of conspiracy, it is necessary to establish by material and evidence about the intention or meeting of mind to hatch the conspiracy which is not there in the present facts of the case. Therefore, the judgment and order recording acquittal qua Shri Jayubhai Amin, A-2, Shri Ashish Natubhai Amin @ Pintu, A-3 and Shri Bharatbhai Dhirajbhai Patel @ Ramesh, A-4 does not call for any interference and deserves to be confirmed.

47. The submission which has been made by Shri Amin, party-in-person, finally that the court may consider the guidelines with regard to the approach while dealing with the acquittal appeals and the acquittal of the accused reinforces the presumption about doubt and therefore the same may not be disturbed even if the other view is possible is required to be considered.

48. There is no quarrel on the broad guidelines laid down by the Hon''ble Apex Court in a judgment reported in Chandrappa and Others Vs. State of Karnataka, and the approach in such appeals. However, at the same time, as stated above, the Hon''ble Apex Court in its judgment in the case of Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu, has also clearly observe that it is the duty of the appellate court to scan through the evidence and has to verify whether the reasons recorded could be sustained for the reasons on appreciation of the material. The apex court has clearly observed that the view which can be taken is a plausible view then it may not be disturbed merely because the other view is possible. However, at the same time, a word of caution has also been expressed that while scrutinizing the evidence and considering the appeal it will not have much relevance whether it is acquittal appeal or conviction appeal and if on the basis of appreciation of material independently if the

appellate court comes to the conclusion that the court below has misdirected either in appreciation of relevant material and considering the relevant provision like the mandatory provision in the present case, it would be obliged to reconsider the entire evidence. A useful reference can be made to the observations made by the Hon''ble Apex Court in its judgment reported in K. Anbazhagan Vs. State of Karnataka and Others . It has been observed,

"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, solely because there might not have been proper assistance by the counsel appearing for the parties. The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasonings in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind - sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A Judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test..."

49. In any case, substantial compliance with the mandatory provision is sufficient. Section 57 is not mandatory and therefore once conscious possession is established the burden would shift on the accused to explain failing which the charges would stand established. A useful reference can be made to the judgment of Hon''ble Apex Court reported in Bahadur Singh Vs. State of Haryana, . Further, the Division Bench of this High Court in a judgment reported in 2012 (0) GLHEL-HC 229550 in the case of Omkarnath Kak @ Panditji v. State of Gujarat has also made the observations on this aspect and therefore the submissions with regard to non-compliance with the mandatory provisions are misconceived.

50. Therefore, while expressing a word of caution, the Hon''ble Apex Court has made it clear that merely because the other view is possible which could not have been taken by the trial court would not justify interference with the order of acquittal if it is a plausible view on appreciation of material and evidence. However, at the same time, if on the scrutiny of the material and evidence after it is confirmed that it rules out any possibility of the innocence of the accused, then such an order of acquittal may not be sustained.

51. As discussed above, having considered and scrutinized the evidence as well as the relevant provisions, the order of acquittal cannot be sustained on the basis of the statutory provisions as the material and evidence which has been appreciated by the court below. In fact, the Hon''ble Apex Court in a judgment

reported in *Sucha Singh and Another Vs. State of Punjab*, has made the observation that exaggerated devotion to the benefit of doubt would be counter productive. It has been observed,

"Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. [See: *Gurbachan Singh Vs. Satpal Singh and others*,]. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See *State of U.P. Vs. Ashok Kumar Srivastava*,]. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See *Inder Singh and Another Vs. The State (Delhi Administration)*,]. Vague hunches cannot take place of judicial evaluation.

"A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in *Stirland v. Director of Public Prosecution* (1944 AC (PC) 315) quoted in *State of U.P. Vs. Anil Singh*,).

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth."

52. The same view has been also expressed in a judgment of the Hon"ble Apex Court reported in *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, expressing concern for the cry of the society and balancing the right of an individual accused vis-?-vis the right of the society. It is emphasised that,

"..... Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless..... "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent...."

53. Therefore, the impugned judgment and order recording acquittal of A-1 Shri Kinit Jayantilal Amin @ Aditya Patel @ Bharat K. Vakharia for the offences under sec. 18 and 22 cannot be sustained and stands set aside. Accordingly, the present appeal stands partly allowed. The charges for the offence under sec. 18 and 22 of the NDPS Act qua A-1 Shri Kinit Jayantilal Amin & Aditya Patel @ Bharat K. Vakharia are held to be proved and accordingly he stands convicted for the aforesaid offences. The charges for the offence under sec. 29 are held not proved. However, acquittal of respondents Nos. 2, 3 & 4 Shri Jayubhai Amin, A-2,

Shri Ashish Natubhai Amin @ Pintu, A-3 and Shri Bharatbhai Dhirajbhai Patel @ Ramesh, A-4 is maintained and is not disturbed.

FURTHER ORDER

"(i) Shri Kinit Jayantilal Amin & Aditya Patel @ Bharat K. Vakharia, A-1, is sentenced to Rigorous Imprisonment for one year for the offence under sec. 18 of the NDPS Act with fine of Rs. 10,000/-, in default Simple Imprisonment for 3 months.

(ii) Similarly, for the offence under sec. 22 of the NDPS Act, he is sentenced to R.I. for one year with fine of Rs. 10,000/-, in default S.I. for 3 months. Both the sentences are ordered to run concurrently.

(iii) However the period for which the A-1 Shri Kinit Jayantilal Amin @ Aditya Patel @ Bharat K. Vakharia has remained in jail, may be considered for set off. The amount of fine to be deposited within four weeks."